

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JIM TEBBUTT**

Claimant

VS.

**MIDWEST CONCRETE MATERIALS**

Respondent

AND

**UNITED FIRE & CASUALTY COMPANY**

Insurance Carrier

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Docket No. 1,005,236

**ORDER**

Respondent and its insurance carrier appealed the January 13, 2003 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

**ISSUES**

This is a claim for an accident that occurred on approximately September 19, 2001, which allegedly resulted in a low back injury and symptoms radiating into the left leg. In the January 13, 2003 Order, Judge Benedict awarded claimant medical treatment.

Respondent and its insurance carrier admit that claimant fell from a fork lift on or about September 19, 2001. But they contest that claimant's present need for medical treatment is related to that accident. Instead, they contend claimant experienced low back pain and left leg pain for several months before that accident and, therefore, claimant has failed to prove that the medical treatment which he now seeks is related to the fall from the fork lift.

The only issue before the Board on this appeal is whether claimant has established that his present need for medical treatment is related to the September 2001 accident that he sustained while working for respondent.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and the parties' arguments, the Board finds and concludes:

Claimant has failed to prove that the medical treatment he now seeks is related to injuries sustained in the September 2001 fall from the fork lift. Accordingly, the January 13, 2003 preliminary hearing Order should be reversed.

At the January 2003 preliminary hearing, claimant testified that he was experiencing low back pain and pain shooting down his left leg. According to claimant, he had never experienced left leg pain before the September 2001 accident. Claimant also testified that after he recovered from an earlier back injury, which occurred in approximately 1999, he did not experience any additional injuries or problems until the fork lift accident.

But records introduced at the preliminary hearing indicate that before the September 2001 accident, claimant visited the Sorell-Iversen Chiropractic Clinic in Manhattan, Kansas, for low back pain and pain radiating into the left leg. The dates of those visits are shown as May 18, June 9, and August 20, 2001. Claimant also visited the chiropractic clinic on September 15, 2001, but that visit may have occurred after the fork lift accident as claimant testified that he remembered seeing the chiropractor either on the day of the fork lift accident or within a day or two after the accident.

The chiropractic records do not reflect a history of falling from a fork lift and, therefore, provide little help in determining what new or increased symptoms, if any, claimant developed due to the September 2001 fall. But the records do include a pain drawing that indicates that at some point in time claimant was complaining of low back pain and left leg symptoms, which were so painful that claimant could not complete a number of clinical tests.

In attempting to prove the relationship between claimant's present need for medical treatment and the September 2001 accident, claimant introduced medical notes from Dr. Michael L. Smith, who claimant began seeing in January 2002. In a May 24, 2002 letter, Dr. Smith wrote that he believed that the fork lift accident aggravated claimant's back. The doctor wrote, in part:

His symptoms for which I saw him are fairly identical to the symptoms which he had back when he saw Dr. Blanchard. He may indeed, and most likely did have a herniated disc at the L4-5 level with lumbar spondylosis when he saw Dr. Blanchard from 5/11/99 through 9/8/00. **However, I do not have any records indicating that Mr. Tebbutt had difficulty over the past year and a half. Nor do I have any records disputing his statement that he fell off a forklift.**

Based on this, it would appear to me that his herniated disc/lumbar spondylosis predates his forklift accident. **However, given his lack of requiring medical attention for a year and a half, I think that it is possible that he aggravated the underlying condition when he fell off the forklift.** (Emphasis added.)

As Dr. Smith was not aware of claimant's chiropractic treatment for low back and left leg symptoms at the Sorell-Iversen Chiropractic Clinic in 2001, Dr. Smith's opinion is entitled

little weight as he lacked critical facts about claimant's ongoing symptoms. And without Dr. Smith's medical opinion, there is little else to establish the necessary link between the recommended treatment and the fork lift accident. In this instance, claimant's testimony fails to establish such link as he had difficulty recalling the extent of his earlier symptoms for which he had sought chiropractic treatment.

Workers have the burden of proof to establish their rights to compensation and to prove the various conditions upon which those rights depend.<sup>1</sup>

"Burden of proof" means the burden to persuade by a preponderance of the credible evidence that a party's position on an issue is more probably true than not when considering the whole record.<sup>2</sup>

Because claimant has failed to establish the relationship between the September 2001 work-related accident and his present need for medical treatment, the request for benefits should be denied.

But claimant is not without a remedy. As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.<sup>3</sup>

**WHEREFORE**, the Board reverses the January 13, 2003 preliminary hearing Order and denies claimant's request for benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2003.

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BOARD MEMBER

c: Jeff Elder, Attorney for Claimant  
James B. Biggs, Attorney for Respondent and its Insurance Carrier  
Bryce D. Benedict, Administrative Law Judge  
Director, Division of Workers Compensation

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<sup>1</sup> K.S.A. 44-501(a).

<sup>2</sup> K.S.A. 2001 Supp. 44-508(g).

<sup>3</sup> K.S.A. 44-534a(a)(2).